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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

W. F. COEN, PETITIONER,

VS.

AMERICAN SURETY COMPANY OF NEW YORK, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Of Counsel.

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AMERICAN SURETY COMPANY OF NEW YORK, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

The statement of fact contained in the petition for writ of certiorari herein omits certain points which respondent wishes to call to this Court's attention.

It was alleged in the petition under which the cause was tried, that on or about March 28, 1935, one F. E. Colvin sold and transferred to appellant a certain promissory note made March 14, 1935, due ninety days after date, payable to the order of said F. E. Colvin in the principal sum of Thirty-five Hundred ($3500.00) Dollars; that said note was executed by Gem City

Finance Company, Inc., by W. Erdman Love, President. A certified copy of the purported note was attached to plaintiff's petition (Tr. 1).

Plaintiff's petition further alleged that as a further consideration of the purchase of the note, F. E. Colvin assigned and transferred to the plaintiff a guaranty bond dated March 14, 1935 executed by the defendant, American Surety Company of New York, and that under the terms and provisions of the same, defendant guaranteed the payment in full of said promissory note on its maturity, and that in the event said note was not paid in full at maturity, defendant agreed to pay to said Colvin the sum of Thirty-five Hundred ($3500.00) Dollars, together with interest and expense incurred in connection with the note (Tr. 2).

Plaintiff's petition further alleged that no part of either the principal or interest due on said note had been paid, and that by reason thereof and under the terms and provisions of the guaranty bond, defendant was indebted to him for the principal of the note.

Under the verified answer of the defendant it was alleged that the alleged note of the Gem City Finance Company, purported to have been sold by Colvin to plaintiff, was a forgery and not a binding obligation on the Gem City Finance Company, and that the bond sued upon, was a forgery and was never signed or executed by the defendant, or any one representing it. Execution of the bond and note for which it was allegedly given as security were both denied, under oath, by defendant.

There was in full force and effect at said time in the State of Missouri, Section 965 Revised Statutes of Missouri, 1929, applicable portions of which were in words and figures as follows:

> "When any petition or other pleading shall be founded upon any instrument in writing, charged to have been executed by the other party and not alleged therein to be lost or destroyed, the execution of such instrument shall be adjudged confessed, unless the party charged to have executed the same deny the execution thereof, by answer or replication, verified by affidavit."

The answer of the defendant in the District Court denied the execution of the bond sued upon, and the answer was duly verified by affidavit, as provided for in above section of the Missouri Statutes.

The plaintiff testified that he made inquiry of Mr. Evans concerning the genuineness of the bond, because he was "depending entirely upon his judgment and opinion in the matter". (Tr. 48 and 51). Prior to the trial of the cause, plaintiff filed no request, under Rule 36 of the Rules of Civil Procedure, for admission of the genuineness of the documents relied upon. The evidence in the cause conclusively established that the alleged note was a forgery; that the bond was a forgery, and that the purported letter from the home office of the defendant company was a forgery. Not only that, but that the stationery upon which it was written was also a forgery.

The evidence disclosed that L. Bert Nye was the manager of the defendant company's branch office at Washington, D. C., and that W. R. Evans was manager of defendant's Kansas City branch office, and that the company had various other branch offices in other cities in the United States.

In the majority opinion of the Circuit Court of Appeals it was correctly said:

> "It is shown by the undisputed evidence that the defendant transacts business over an extensive

territory; that its principal office and the home of its general officers are in New York City, and that it has established in various cities of the United States offices for the transaction of business arising in their respective localities, which offices are under the immediate supervision of agents called branch managers."

The plaintiff knew that the purported bond sued upon had allegedly been executed by L. Bert Nye, the defendant's branch manager at Washington, D. C., and that W. R. Evans, branch manager of the Kansas City office had nothing to do with any negotiations leading up to the alleged execution or delivery of the bond. It was not established that Evans had any knowledge of the transaction except through statements made to him by Coen subsequent to the date of the alleged execution and delivery of the bond sued upon.

The foregoing facts are called to the Court's attention for the reason that they do not appear in petitioner's statement.

SUMMARY OF ARGUMENT.

I.

The opinion of the Court of Appeals in holding that under the evidence W. R. Evans, manager of respondent's office in Kansas City, Missouri was without authority to confirm the validity of the guaranty bond alleged to have been executed by L. Bert Nye, manager of another branch office of the respondent in Washington, D. C., was in no wise in conflict under the facts as disclosed by the record in the case, with the opinion of the Supreme Court of Missouri in the case of James H. Forbes Tea & Coffee Company vs. Baltimore Bank, 345 Mo. 115, 139 S. W. (2d) 507.

James H. Forbes Tea & Coffee Co. v. *Baltimore Bank,* 345 Mo. 115, 139 S. W. (2d) 507.

Kelso v. *Lincoln Natl. Life Ins. Co.,* 227 Mo. App. 184, 51 S. W. (2d) 203.

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Scrivner v. *American Can & Foundry Co.*, 330 Mo. 408, 50 S. W. (2d), 1001.

II.

The Court of Appeals by holding that the declarations of W. R. Evans, respondent's branch manager at Kansas City, to the effect that he was acquainted with L. Bert Nye's signature and in his opinion it was genuine, were inadmissible in evidence because violative of the hearsay rule, was not in conflict with controlling decisions of the Supreme Court of Missouri in the cases of Shelton vs. Wolf Cheese Company, 338 Mo. 1129, 93 S. W. (2d) 947; Whittington vs. Westport Hotel Operating Company, 326 Mo. 1117, 33 S. W. (2d) 963; Philbert vs. Benjamin Anshel Company, 342 Mo. 1239, 119 S. W. (2d) 797; Simpson Advertising Company vs. Manufacturing & Merchants Association, 330 Mo. 1049, 51 S. W. (2d) 1019; State ex inf. vs. Armour Packing Company, 173 Mo. 359, 73 S. W. 645.

Shelton v. *Wolf Cheese Company*, 338 Mo. 1129, 93 S. W. (2d) 947.

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Simpson Advertising Company v. *Manufacturing & Merchants Association*, 330 Mo. 1049, 51 S. W. (2d), 1019.

State ex inf. v. *Armour Packing Company*, 173 Mo. 359, 73 S. W. 645.

III.

The opinion of the Circuit Court of Appeals in holding that the introduction in evidence by respondent of the genuine signature of L. Bert Nye did not show prima

facie the genuineness of the guaranty bond, did not decide an important question of local law in a manner (1) in direct conflict with controlling decisions of the Supreme Court of Missouri in the cases of Sanders vs. North End Building & Loan Assn., 178 Mo. 674, 77 S. W. 833; State vs. Thompson, 141 Mo. 408, 42 S. W. 949; and State vs. Pace, 269 Mo. 682, 192 S. W. 428, (2) in conflict with and violative of Section 1751, Missouri Revised Statutes, 1929 and (3) in conflict with and violative of the Federal Statute in respect to proof of disputed writings (28 U. S. Code Ann. 638).

Section 965 Revised Statutes of Missouri, 1929.

Meredith v. *Brock*, 322 Mo. 869, 17 S. W. (2d) 345.

Sanders v. *North End Building & Loan Assn.*, 178 Mo. 674, 77 S. W. 833.

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State v. *Pace*, 269 Mo. 682, 192 S. W. 428.

Section 1751 Revised Statutes of Missouri, 1929, 28 U. S. Code Ann. 638.

IV.

The Circuit Court of Appeals by holding that the burden of proof lay upon petitioner to prove that the guaranty bond was not a forgery did not decide an important procedural question in a manner violative of the provisions of Rule 8 (c) of the Federal Rules of Civil Procedure.

Meredith v. *Brock*, 322 Mo. 869, 17 S. W. (2d) 345.

Rule 8 (c) Federal Rules of Civil Procedure.

Rule 36 Federal Rules of Civil Procedure.

V.

The importance of the question presented.

McDearmott v. *Sedgwick*, 140 Mo. 172, 39 S. W. 776.

Miller v. *Bowen Coal & Mining Co.*, 40 S. W. (2d) 485 (Mo. App.).

State ex rel. v. *Globe Indemnity Co.*, 29 S. W. (2d) 743 (Mo. App.).

ARGUMENT.

(A) The basis of the petition for writ of certiorari to the United States Circuit Court of Appeals, is the contention that the opinion of the Circuit Court of Appeals decided important questions of local law in a manner in direct conflict with prior decisions of the Supreme Court of Missouri, and in conflict with and in violation of the provisions of Rule 8 (c) of the Federal Rules of Civil Procedure.

The reasons relied upon for allowance of the writ, and the alleged specifications of error, will be answered in this argument in the same order in which they appear in petitioner's petition and brief in support thereof.

I.

The opinion of the Court of Appeals in holding that under the evidence W. R. Evans, manager of respondent's office in Kansas City, Missouri was without authority to confirm the validity of the guaranty bond alleged to have been executed by L. Bert Nye, manager of another branch office of the respondent in Washington, D. C., was in no wise in conflict under the facts as disclosed by the record in the case, with the opinion of the Supreme Court of Missouri in the case of James H. Forbes Tea & Coffee Company vs. Baltimore Bank, 345 Mo. 115, 139 S. W. (2d) 507.

Circuit Judge Thomas in the majority opinion in this case held that the evidence showed that W. R. Evans, the branch manager of the respondent at Kansas City, Missouri, was without express or implied authority to confirm the validity of the guaranty bond sued upon, and held that nothing in the telegram from the New

York office of the respondent expressly represented that the said Evans was authorized to pass upon the validity of the guaranty bond executed by branch manager Nye of Washington, D. C.

The majority opinion in this respect followed and applied the ruling decisions of the Appellate Courts of the State of Missouri, and was in no way in conflict with the decision of the Supreme Court of Missouri in the case of *James H. Forbes Tea & Coffee Company* v. *Baltimore Bank*, 345 Mo. 115, 139 S. W. (2d) 507, as contended by the petitioner.

In that case the tea company sued the bank in conversion for the shortage occasioned by their acceptance of company checks endorsed by Einhorn. The bank defended upon the ground that Einhorn had implied authority to handle the company funds and to deposit the same in his personal account. The facts in that case can be clearly distinguished from the case at bar in the following particulars:

(1) The appellant tea company, being plaintiff, had the burden of proving that Einhorn had acted *outside* the scope of his authority as branch manager; while in the case at bar, the burden was upon the petitioner to show that Evans acted *within* the scope of his authority.

(2) The appellant tea company had given Einhorn the express written authority "to receive payment of accounts"; while in the case at bar, no express authority to Evans was shown.

(3) The evidence in the tea company case was detailed, and particularly as to the nature and extent of Einhorn's powers and duties as branch manager; while in the case at bar, none of Evans' powers, obligations, or duties were shown, except the bare fact he bore the title

of branch manager. As Judge Thomas said in the majority opinion in the case at bar (Tr. 218):

> "Plaintiff's last contention is that Evans' specific authority to pass upon the validity of the bond is implied in the admitted fact that he was the branch manager of defendant's Kansas City office. The burden was upon plaintiff to show that the representation made by Evans was within the scope of his powers and duties. There is no evidence in the record showing Evans' actual authority nor the nature of his duties on behalf of the defendant from which his authority could be implied. The plaintiff's contention depends wholly upon the general authority of the agent of a corporation implied as a matter of law in the title Branch Manager."

(4) In the tea company case there was competent evidence that the company had actual knowledge that Einhorn was receiving payments on its accounts and depositing the same in his personal checking account at the defendant bank, and it was shown that the tea company had requested Einhorn to make remittances of the money to it, and that Einhorn, in accordance with this request, had actually remitted some of the money to the tea company by means of his personal check; while in the case at bar, there was no showing that the defendant surety company knew anything about the Coen-Colvin-DeArmand deal, or the activities of Evans in regard thereto.

(5) All of the details and transactions giving rise to the conversion suit against the bank by the tea company directly pertained to the business of the tea company carried on in its Kansas City branch and entrusted to the sole management of its branch manager Einhorn; while in the case at bar, the deal so far as it related to the surety company, was purportedly carried on and transacted in Washington, D. C. at the office of the company which was in charge of L. Bert Nye, and over which Evans had no supervision or control.

(6) In the case at bar, the alleged statements of Evans vouching for the validity of the surety bond, upon which plaintiff relies as sole ground for estoppel, were at the most a mere expression of opinion as to the genuineness of the alleged signature of Nye and the legality of the bond, and were so understood by the plaintiff; while in the tea company case there was undisputed evidence of actual endorsements by Einhorn of company remittances and the depositing of those remittances to his personal account.

The real reasons for the conclusion reached by the Supreme Court of Missouri in the *James H. Forbes Tea & Coffee Company* case clearly appears in the following language: (139 S. W. (2d) l. c. 509)

> "The only conclusion that can be drawn from the evidence is that Einhorn was appellant's manager of the Kansas City branch. Appellant executed the instrument addressed 'To whom it may concern', stating that Fred Einhorn was its manager with power 'to receive payments on accounts' not merely to receive collections. This instrument was given to respondent two days after Einhorn made the deposit with the bank. Moreover, the oral evidence shows that Einhorn, and no one else, was the manager during the time in question. He had authority to employ and discharge the employees of the Kansas City Branch. He had authority to arrange for discounts with its customers; to allow customers credit for advertising; to settle accounts and to receive payment of accounts. As previously stated, the Kansas City customers of appellant dealt only with that branch office; merchandise was sent to it and then later sold to the customers, the same as if it had been an independent jobber. Moreover, appellant's president wired Einhorn on several occasions to send them 'a big check' which was done by Einhorn's sending them his personal check drawn on respondent bank. He could not have meant a

check on the Commerce Trust Company because the St. Louis office knew exactly the amount on deposit in that bank, and only the officers of the home office had authority to sign checks on that bank. There is evidence in the record that Einhorn had endorsed appellant's check long before he opened an account in respondent bank."

Judge Thomas in the majority opinion in the case at bar, in discussing the James H. Forbes Tea & Coffee Company case, properly said (Tr. 219):

"In that case the liability of the defendant bank depended upon the authority of a branch manager of the plaintiff to endorse checks payable to the plaintiff and to deposit them in his personal account in the bank. Basing its conclusion upon particular facts and the course of conduct of the plaintiff the court held that: 'Einhorn (the branch manager) had the apparent, if not the actual, authority to endorse the checks.' In the course of the opinion there are general expressions stating the rule set out above applicable to the apparent or implied powers of a general agent. It is obvious that the nature of the question concerning the implied authority of a branch manager which has arisen in this case was not particularly called to the attention of the court in that case. The case cannot, therefore, be relied upon as an authority in this case where the exact point is in issue. Had the court's attention been directed to the distinction it would no doubt have been more precise in its statements. It is a settled rule 'that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits.' *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 291. * * *. We are convinced of the truth of the foregoing observations in respect to the opinion in the Baltimore Bank case, *supra*, for the reason that the courts of Missouri have consistently, insofar as our investigation has disclosed and insofar as we are aided by the briefs, applied the restricted second

rule, *supra*, in determining the implied scope of the authority of subordinate agents and branch managers or agents in charge of particular units of their principals' business."

The "second rule" referred to by Judge Thomas, is that where one is entrusted with the management of a particular branch of a business his authority does not extend beyond such contracts and acts as are incident to the management of that particular branch.

Such has been the rule in Missouri in a long line of decisions, namely:

Kelso v. *Lincoln Nat. Life Ins. Co.*, 227 Mo. App. 184, 51 S. W. (2d) 203.

Punton v. *United States Life Ins. Co.*, 213 Mo. App. 49, 245 S. W. 1080.

Bradley-Metcalf Co. v. *Tootle-Campbell Dry Goods Co.*, (Mo. App.), 180 S. W. 389.

Sanders v. *Chartrand*, 158 Mo. 352, 59 S. W. 95, 98.

Skene v. *Union Casualty & Surety Company*, 91 Mo. App. 120.

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Chenoweth v. *Pacific Express Co.*, 93 Mo. App. 185.

St. Louis Beverage Co. v. *Planters Grain, Elevator, Mule & Feed Co.*, 200 S. W. 780, (Mo. App.).

Scrivner v. *American Can & Foundry Co.*, 330 Mo. 408, 50 S. W. (2d) 1001.

The opinion of Judge Thomas properly followed the law in the State of Missouri regarding the implied authority of a branch manager, and the opinion of the court below in no wise conflicted with any previous opinions

of the Courts of last resort in the State of Missouri, and particularly was not in conflict with the *James H. Forbes Tea & Coffee Company* v. *Baltimore Bank, supra,* case.

We submit that the opinion in the last mentioned case is no authority for the position that the mere title of branch manager imparts binding authority to all actions of said managers, nor is it authority for the position of petitioner that Evans, because he bore the title of branch manager, had the authority to confirm the validity of the guaranty bond sued upon and bind his principal by such confirmation. The rule in Missouri remains that such actions must be shown to be within the scope of that branch manager's express or implied authority and must be shown to pertain to the position and duties entrusted to him, and the burden of proof of these matters rests upon the plaintiff.

There was an absolute failure on the part of the petitioner herein to prove by any competent evidence that Evans, the Kansas City branch manager of the respondent, had the express or implied authority to verify or confirm the guaranty bond sued upon.

We, therefore, respectfully submit that the opinion of Circuit Judge Thomas in the court below did not conflict with any prior decisions of the courts of last resort in the State of Missouri, and particularly was not in conflict with the case of *James H. Forbes Tea & Coffee Company* v. *Baltimore Bank, supra.*

II.

The Court of Appeals by holding that the declarations of W. R. Evans, respondent's branch manager at Kansas City, to the effect that he was acquainted with L. Bert Nye's signature and in his opinion it was genuine, were inadmissible in evidence because violative of the hearsay rule, was not in conflict with controlling decisions

of the Supreme Court of Missouri in the cases of Shelton vs. Wolf Cheese Company, 338 Mo. 1129, 93 S. W. (2d) 947; Whittington vs. Westport Hotel Operating Company, 326 Mo. 1117, 33 S. W. (2d) 963; Philbert vs. Benjamin Anshel Company, 342 Mo. 1239, 119 S. W. (2d) 797; Simpson Advertising Service Co., vs. Manufacturing & Merchants Association, 330 Mo. 1049, 51 S. W. (2d) 1019; State ex inf. vs. Armour Packing Company, 173 Mo. 359, 73 S. W. 645.

The opinion of the Circuit Court of Appeals was not in conflict under the facts disclosed by the record with any of the above opinions of the Supreme Court of Missouri, but laid down and followed the rule promulgated by those opinions. It is to be remembered that the petitioner in the District Court sought to establish the genuineness of the alleged bond sued upon after the execution of the same had been denied under oath by proving that subsquent to the date that the bond had been allegedly executed by L. Bert Nye, W. R. Evans, the defendant's district or branch manager at Kansas City stated that he was familiar with Nye's signature, and that in his opinion the signature was Nye's. This was purely an attempt to prove a declaration or an admission of the agent of the respondent relative to an act or transaction made after the occurrence of the act, namely, the alleged execution of the bond.

In the case of *Shelton* v. *Wolf Cheese Co.*, 338 Mo. 1129 the Supreme Court of Missouri said:

> "But 'declarations' or 'admissions' of an agent with respect to an act or transaction made after the occurrence of the act or the completion of the transaction are not provable against the principal. This rule is the basis for the exclusion of evidence of declarations of an agent that he had previously bound his principal by a contract, as well as for exclusion of evidence of the admissions of a servant whose alleged negligence caused injury to another made

> long after the accident. Such statements are merely hearsay like those of any other person, and cannot affect his principal. A rule that would allow an agent after a transaction is closed to admit away the rights of his principal would be too dangerous to be tolerated."

The fact that Evans was the branch manager for the respondent company at Kansas City, Missouri did not make his statement of opinion relative to the signature of Nye admissible to prove the genuineness of Nye's signature. It is to be remembered that Evans was not placed upon the stand. In *Shelton* v. *Wolf Cheese Co.* the Supreme Court of Missouri further said:

> "But we do not understand that a manager should be deemed to so represent the principal for all purposes that any statement or declaration at any time made by him in reference to the company's rights, interest or affairs at that point would be admissible in evidence against the principal."

The Circuit Court of Appeals, in ruling the alleged statements and declarations of W. R. Evans inadmissible in evidence because violative of the hearsay rule, followed the rule set forth by the Supreme Court of Missouri in above case.

In the case of *Whittington* v. *Westport Hotel Operating Co.*, 326 Mo. 1117 the statements of the agent relative to past transactions were admitted in evidence without any objection on the part of the defendant company. The Supreme Court of Missouri held that because no objection had been made error could not be predicated thereon. The Court said, l. c. page 1124:

> "The record shows that the foregoing conversations were admitted in evidence without an objection on the part of the Sidehoff Company. Consequently error may not be predicated thereon."

The opinion of the Circuit Court of Appeals in no wise conflicts with anything said by the Supreme Court of Missouri in that case.

In the case of *Philbert* v. *Anshel Co.*, 342 Mo. 1239 relied upon by the petitioner, the Court held that the admission in evidence of statements of an agent or an employee of the defendant as to past transactions was immaterial. The statement admitted in evidence was to the effect that the employee had stated that a certain other employee had made a box which caused the plaintiff's injury. The Court did not hold that such testimony was admissible, but stated that it was not error because if it was the defendant's duty to make the box it was immaterial which of its employees did the work, and that therefore the admission in evidence of the statement of the employee that he had made the box was immaterial and therefore not erroneous.

In the case of *Simpson Advertising Service Co.* v. *Manufacturers & Merchants Assn.*, 330 Mo. 1049 the statement admitted in evidence was made by the agent in charge of the transaction being then actually conducted. The Court held that the statement was admissible because it was made by the agent who was in full charge of the transaction of ordering the posters and frames the purchase price of which plaintiff sought to recover by the action. The statement was made at the time the agent was present for the purpose of ordering the posters and frames. The statement was made as a part of the transaction and was not a statement of opinion made after the occurrence of an act or the completion of a transaction as was the alleged statement of Mr. Evans concerning the genuineness of the bond made subsequent to the time that the name L. Bert Nye had been forged to the bond. The statements of agents held admissible in evidence under the opinion of the Supreme

Court of Missouri in the case of *State* v. *Armour Packing Co.*, 173 Mo. 356, were statements made during the very performance of an act and transaction. They were held admissible because so made. They were not statements or declarations made after the occurrence of an act or the completion of a transaction. They were not statements or expressions of opinion concerning the question of the genuineness of a disputed signature. The opinion of the Circuit Court of Appeals is in no wise in conflict with any of the opinions of the Supreme Court of Missouri cited and relied upon by petitioner on this point. The opinion of the United States Circuit Court of Appeals followed and applied the law of Missouri as laid down in the case of *Shelton* v. *Wolf Cheese Co., supra.*

In the case at bar, as shown by plaintiff's own evidence, it was his theory all negotiations for the bond had been had with L. Bert Nye, the defendant's branch manager at Washington, D. C., and with whose office W. R. Evans had no connection of any kind or character. It was the contention of the plaintiff that the bond had been executed and delivered by Nye on behalf of the surety company. If the bond was executed and delivered by Nye, then it became a legal, binding obligation at that time. Evans did not enter the picture until after all these acts had transpired and after the transaction had been completed. The bond at the time it was exhibited to Evans for his opinion, either was or was not a valid, binding obligation. The signature of L. Bert Nye thereon, either was or was not his genuine signature. Any statement made by Evans in regard thereto could be nothing more than a statement of an opinion that Nye had, or had not, previously thereto, affixed his name to the instrument.

III.

The opinion of the Circuit Court of Appeals in holding that the introduction in evidence by respondent of

the genuine signature of L. Bert Nye did not show prima facie the genuineness of the guaranty bond, did not decide an important question of local law in a manner (1) in direct conflict with controlling decisions of the Supreme Court of Missouri in the cases of Sanders vs. North End Building & Loan Assn., 178 Mo. 674, 77 S. W. 833; State vs. Thompson, 141 Mo. 408, 42 S. W. 949; and State vs. Pace, 269 Mo. 682, 192 S. W. 428, (2) in conflict with and violative of Section 1751, Missouri Revised Statutes, 1929 and (3) in conflict with and violative of the Federal Statute in respect to proof of disputed writings (28 U. S. Code Ann. 638).

The fallacy of this contention is well pointed out in the majority opinion of the Circuit Court of Appeals. The above cases and statutes merely hold that where the genuine and disputed signatures are properly before the jury that the jury has the power to look at the signatures and say which is genuine and which is a forgery. In the opinion of the Court of Appeals (Tr. p. 214) the Court said:

> "But on the issue of the actual execution of the bond the forged signature was not properly before the jury for comparison."

It is to be remembered that execution and delivery of the bond was denied under oath. Under the provisions of Section 965, R. S. Mo. 1929, as applied and interpreted by the appellate courts of Missouri the bond was not admissible in evidence until its execution was established by competent evidence offered by the plaintiff.

The Supreme Court of Missouri, in the case of *Meredith* v. *Brock, et al.*, 322 Mo. 869, 17 S. W. (2d) 345, held that where verified answer was filed under the terms of said statute denying the execution of the instrument sued upon the burden was upon the party re-

lying thereon to establish and prove by a preponderance of the evidence the execution of the instrument sued upon. In that case the Supreme Court of Missouri said:

> "In view of the verified answers of the several defendants which deny the signing and delivery (i. e. the execution) by Brock and his co-defendants of the alleged contract of October 29, 1925, which instrument is the foundation of plaintiff's petition, the burden rested upon plaintiff to establish and prove by a preponderance of the evidence the execution (including the signing and delivering) of the alleged contract."

Plaintiff offered not one syllable of evidence, outside of the hearsay testimony of W. R. Evans, concerning the genuineness of the bond, and no evidence of delivery. Under such circumstances plaintiff failed to meet the burden that is upon him under the law of Missouri and the Circuit Court of Appeals very correctly ruled and held that the forged signature was not properly before the jury for comparison with the genuine signature. The ruling of the Circuit Court of Appeals therefore was in no wise in conflict with any of the Missouri cases cited under this point, or in conflict with Section 1751 of the Missouri Revised Statutes of 1929, or 28 U. S. Code Ann. Section 638.

IV.

The Circuit Court of Appeals by holding that the burden of proof lay upon petitioner to prove that the guaranty bond was not a forgery did not decide an important procedural question in a manner violative of the provisions of Rule 8 (c) of the Federal Rules of Civil Procedure.

In the first place the Circuit Court of Appeals did not hold that the burden of proof was upon the plaintiff to prove that the guaranty bond was not a forgery.

What the Court of Appeals held was that under the pleadings, the execution and delivery of the bond having been denied under oath the burden of proof was upon the plaintiff to prove execution and delivery of the instrument sued upon. In so holding and ruling the Circuit Court of Appeals followed and applied the rule laid down by the Supreme Court of Missouri in the case of *Meredith* v. *Brock, et al.*, 322 Mo. 869 17 S. W. (2d) 345 heretofore cited and referred to. The ruling of the Court of Appeals was not violative of the provisions of Rule 8 (c) of the Federal Rules of Civil Procedure. That section does not provide for or fix the burden of proof in cases involving disputed documents or forged instruments.

Rule 8 (c) of the Federal Rules of Civil Procedure in no wise shifts the burden of proof from plaintiff to a defendant. In the case at bar the burden of proving execution and delivery of the bond sued upon was upon the plaintiff. Rule 8 (c) merely provides that the burden of proof in affirmative or special defenses shall be upon the party asserting them. In the case at bar no duty or burden devolved upon the defendant to disprove the execution and delivery of the bond sued upon until the plaintiff had sustained the burden of proving execution and delivery.

Rule 8 (c) of the Federal Rules of Civil Procedure had absolutely no application under the facts in the case at bar. The applicable rule had the plaintiff sought to benefit was Rule 36, Rules of Civil Procedure. That rule provides that after the pleadings are closed a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant document described in and exhibited with the request, or of the truth of any relevant matters of

fact set forth therein, and then provides that the opposite party shall either admit or deny under sworn statement the matters of which an admission is requested. Of course, under that rule, if the genuineness of the bond had been admitted by the defendant then it would have been unnecessary for the plaintiff to establish the genuineness of the same. However, even under that rule, had plaintiff sought to take advantage of the same a sworn denial of the genuineness of the instrument sued upon would have placed the burden of proof upon the plaintiff.

V.

The importance of the question presented.

Petitioner states in Section F of his argument that if the decision of the Circuit Court of Appeals herein is allowed to stand it will seriously affect the branch office system of doing business, and curtail and limit the business of large national concerns operating through branch offices. Petitioner states that for that reason the decision is of vital importance, and should not be allowed to stand. Respondent respectfully urges that there are other matters involved in this lawsuit which are of greater importance. This becomes apparent upon the broad general ground of public policy when it is considered that the petitioner's lawsuit is based upon a forged surety bond given to secure a forged promissory note purportedly executed by a corporation whose corporate existence had ceased long prior to the date of the execution, and which bond is alleged to have been confirmed by a forged letter written upon the forged letterhead and water-marked stationery of the respondent. The whole transaction is so permeated with fraud and illegality that to allow a recovery upon those documents would in the respond-

ent's opinion be of much greater importance upon the basis of public policy.

The courts have not been prone, and should not be prone to support and breathe life into illegal and forged documents. The Supreme Court of Missouri has expressed itself along those lines in the case of *McDearmott* v. *Sedgwick*, 140 Mo. 172, in which it was said, l. c. 181, 182:

> "The principle is well settled that no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. This is a principle founded upon public policy. Not for the sake of the defendant, but for the law's sake, and that alone. *Attaway* v. *National Bank*, 92 Mo. 485; *Sprague* v. *Rooney*, 104 Mo. 360; *Atlee* v. *Fink*, 75 Mo. 102."

In the case of *Miller* v. *Bowen Coal & Mining Co.*, 40 S. W. (2d) 485 (Mo. App.) plaintiff sought to recover moneys due him under his mining contract, and for rental alleged to be due him under said contract for a railway switch placed on the surface of the lands covered by the contract by the defendant. By answer the defendant set up the defense that plaintiff being merely a life tenant had no authority to make the alleged contract sued upon, and that the same was invalid and unenforceable. The Court of Appeals held that the mining lease was illegal for the reason that plaintiff being a life tenant could not legally open mines or lease the lands for that purpose, and thus destroy the value of the remainder. The Court said, l. c. 489:

> "There can be no doubt that the lease was illegal, nor is there any doubt that the law refuses aid to a litigant who bases his cause of action upon an immoral or illegal transaction."

The Court again said in this decision, l. c. 490:

> "We think the contract or lease is so infected with illegality as to render it entirely unenforceable. Its performance involved the perpetration of a positive wrong and was prohibited by law."

In the case of *State ex rel.* v. *Globe Indemnity Co.*, 29 S. W. (2d) 743, it was said, l. c. 748:

> "Where fraud enters into a transaction it permeates and taints it throughout and reaches from the act to the resulting consequence."

We therefore urge that the decision of the Circuit Court of Appeals in denying recovery upon these illegal and forged documents followed the broad general principles as laid down in the above cases, and their decision was proper upon the grounds of public policy.

We do not believe that the opinion of the Circuit Court of Appeals in any way affects the transaction of business by national concerns through branch offices.

The petitioner in seeking to establish the importance of the question presented states that under the decision of the Circuit Court of Appeals a local patron would be bound to inquire of the home office whether the local manager had authority to transact a particular kind of business. The petitioner doubtless had some question in his mind as to the authority of Nye, the branch office manager at Washington, D. C., to execute such a bond as he contemplated acquiring. He made inquiry of the home office concerning Nye's authority. Likewise the escrow agreement provided that the purchase money of the note should not be turned over until the bank had received "direct advice from the American Surety Company of New York, New York, saying that

this bond is authorized and that they recognize their liability under said bond to W. F. Coen." (Tr. of Rec. p. 85).

CONCLUSION.

In conclusion it is respectfully submitted that the Circuit Court of Appeals did not decide important questions of local law in a manner in conflict with local decisions, and that the petition for certiorari should be denied.

Respectfully submitted,

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